

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-1112

To be argued by
ROBERT J. JOSSEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1112

UNITED STATES OF AMERICA,

Appellee,

—v.—

HAROLD STEPHEN ERM and GEORGE
FREDERICK RIKER,

Defendants-Appellants.

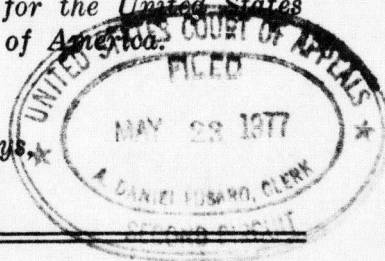
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

George F. Riker and Harold S. Erm appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on February 3, 1977 and February 17, 1977, respectively, after a nine day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 76 Cr. 669, filed on July 22, 1976 in four counts, named as defendants George F. Riker, Harold S. Erm, Charles R. O'Brien and Salvatore L. Giordano, Jr. Count One charged the defendants with conspiracy to steal, receive and have in their possession goods and chattels valued in excess of \$100 which had been moving in and a part of a shipment in interstate commerce, and Count Two charged the same defendants with the substantive offense of receiving and having in their posses-

sion such stolen goods, in violation respectively of Title 18, United States Code, Sections 371 and 659. Counts Three and Four charged Riker alone with transporting in interstate commerce a stolen motor vehicle and with receiving and concealing a stolen motor vehicle which had been moving in interstate commerce, in violation respectively of Title 18, United States Code, Sections 2312 and 2313.

Trial commenced against all defendants on December 13, 1976 and concluded on December 23, 1976, when the jury found Riker, Erm and O'Brien guilty on all counts of the indictment in which they had been named as defendants.*

On February 3, 1977, Judge Owen sentenced Riker to concurrent terms of imprisonment of four years on each count of the indictment. On February 17, 1977, Judge Owen sentenced Erm to a one-year term of imprisonment on Count One, suspended the imposition of sentence on Count Two and placed Erm on probation for a period of five years.**

Both Riker and Erm were admitted to bail pending appeal.

Statement of Facts

A. The Government's Case

The Government's evidence at trial demonstrated that over the weekend of February 6-9, 1976, George Riker, Harold Erm, Charles O'Brien and Salvatore Giordano,

* Defendant Giordano was acquitted by the jury.

** On February 3, 1977 O'Brien was sentenced to a fine of \$1,000 and placed on unsupervised probation for five years. O'Brien has not appealed from his judgment of conviction.

together with others, pilfered and carried away for sale a substantial part of the meat cargo contained on a 1975 Kenworth tractor and refrigerated Dorsey trailer which had been stolen by Riker from the Chris-Ann Motel in North Bergen, New Jersey on the night of February 5, 1976 and brought to Fisher Avenue, Nanuet, New York. When the tractor and trailer were recovered by agents of the Federal Bureau of Investigation on February 9, 1976, over \$16,000 of the valuable fresh cargo had been removed from the trailer. The tractor-trailer unit was found parked in the vicinity of 15 Fisher Avenue, Nanuet, New York and in the immediate possession of Riker and Ronnie George Hamilton, who lived at that address. Hamilton, named as an unindicted co-conspirator, and his wife, Joy, testified at trial as witnesses called by the Government and placed each of the defendants at Fisher Avenue helping to unload and cart away the stolen cargo over the weekend of February 6-8, 1976.

1. The theft of the tractor-trailer unit

At about 9:25 p.m. on the snowy Thursday night of February 5, 1976, Gary Clark, a truckdriver, parked the 1975 Kenworth tractor and refrigerated Dorsey trailer which he was hauling from Chicago, Illinois, in the parking lot of the Chris-Ann Motel on Routes 1 & 9, North Bergen, New Jersey. (Tr. 31-32; 34-36; GX 5B, 5C, 4B, 4C, 12A).^{*} When Clark awoke the next morning the tractor-trailer unit—which was filled with thousands of dollars worth of fresh pork, fresh hams and canned hams, constituting the balance of Clark's shipment destined for North Bergen and Secaucus, New Jersey—

^{*} References to the trial transcript are cited as "Tr."; "GX" refers to Government Exhibits received in evidence; "Br." refers to pages in the Briefs of defendants.

was gone. (Tr. 30, 36; GX 19A, 21A and 20C). Clark did not see the unit again until Tuesday, February 10, 1976, after it had been recovered by the FBI and brought to South Kearney, New Jersey by the shipping agent. (Tr. 41, 70, 97, 984-88).*

2. The tractor-trailer arrives at Fisher Avenue, Nanuet, N.Y

After Clark left the tractor-trailer unit for the night on February 5th, it was next seen at about 11:45 p.m. as it cut across the Swift Electric parking lot on Prospect Street and Fisher Avenue, Nanuet, New York. Charles Siefert, a Nanuet resident, observed the trailer unit turning on to Fisher Avenue while he was plowing snow that had already accumulated that night. Siefert drove down Fisher Avenue—a residential dead-end street—to make inquiry whether the driver was lost. He then was told by the sole occupant of the tractor, defendant Riker, "I'm George from the chrome shop. I'm waiting for Ham to come home." (Tr. 526-27, 529-32). Siefert's conversation with Riker was also observed from a distance by Ruth Boross, a neighbor of the Hamiltons, and by Joy Hamilton, Ronnie Hamilton's wife. Neither Siefert, Boross nor Joy Hamilton, observed any other moving cars in the vicinity of the tractor-trailer or on Fisher Avenue at that time. (Tr. 562-63; 579-582; 684-85). Riker then

* Clark was driving the tractor-trailer as an independent contractor for the shipping agent, Werner Continental. The shipment in question consisted of three deliveries of produce loaded in Clark's presence in Chicago. Prior to Clark's parking of the unit on Thursday night, he had completed one of the deliveries to Trenton, New Jersey, but planned the remaining two stops for the following day. (Tr. 30, 34-35, 70, 97; GX 22). The bills of lading and other shipping documents were received in evidence. (GX 19A, 21A, 20C, 20D, 21C).

turned the tractor-trailer around so that the cab was facing the open end of Fisher Avenue, and, after a brief conversation with Joy Hamilton, returned to the cab to await the arrival of Ronnie Hamilton. (Tr. 561-62, 684-85).

Ronnie Hamilton arrived home that night around 12:30 A.M. (Tr. 185-88, 397-98). On the basis of earlier conversations with Riker, Hamilton knew that Riker would be bringing a tractor to him, allegedly to have Hamilton assist Riker in removing and chroming various metallic parts of the tractor. In conversations that took place in December, 1975 and January, 1976, Riker, who owned a chrome-plating shop in Paterson, New Jersey, told Hamilton that a customer named "Drew" would be delivering a truck at some future date for re-chroming. (Tr. 182-85, 359-61, 369-70). Upon his arrival home on February 5, 1976, Hamilton helped Riker unhook the tractor from the trailer, and Riker then drove the tractor into the Hamilton's driveway, leaving the trailer-box in the vacant field adjoining 15 Fisher Avenue.* Riker then borrowed Hamilton's car and drove to his home in West Paterson. (Tr. 185-88, 280, 397-98, 1318-20; GX 4B, 4C, 5B, 5C).

3. The unloading of the cargo: Friday, Saturday and Sunday, February 6, 7 and 8

On Friday, February 6, 1976, Riker returned to the Hamilton's house and told Ronnie Hamilton that in addition to rechroming the tractor, "Drew" wanted the tractor painted. Hamilton and Riker, together with a friend of Hamilton's, Bob Betz, then drove around the county unsuccessfully looking for an empty garage to

* Each vehicle remained in its respective position for the balance of the weekend.

store the tractor and trailer. Later, Hamilton and Betz drove Riker to the Golden Star Diner on Route 46, New Jersey, where Riker picked up his car which he told Hamilton he had left at the diner the night before. (Tr. 188-92, 402-04).

The tractor-trailer unit remained untouched until Saturday night, February 7, 1976. In the early evening of that day, Riker, after advising Hamilton by phone that he was coming up with others to work on the tractor-trailer, arrived at Fisher Avenue with Erm and a man identified only as "Wolfie." Riker, Erm, Wolfie and Hamilton then proceeded to the trailer unit where, in firemen's chain fashion, they disgorged the trailer of part of its fresh meat contents.* (Tr. 194-196, 201, 405-06, 410, 584-86). After the meat was loaded onto a flatbed truck, Erm and Wolfie left, while Riker remained to visit with the Hamiltons. Riker explained to the Hamiltons that the tractor-trailer unit was a "repossessed" load, that the meat had not been delivered prior to repossession, and he invited the Hamiltons to take whatever pieces of meat they wished. (Tr. 201, 203-04, 412-13, 588). Before leaving, Riker advised Mr. and Mrs. Hamilton that other men would be coming over later that night and that Ronnie should give the key to the trailer to these men. (Tr. 207-08, 590; GX 1).

Shortly after, that same night, O'Brien and Giordano arrived, introduced themselves to the Hamiltons as acquaintances of Riker's and asked for and received the key to the trailer. O'Brien and Giordano left the Hamiltons' house for a while, and returned the key approxi-

* Hamilton testified that he first learned the trailer had cargo on the occasion of Riker's and Erm's Saturday night visit.

mately one-half hour later. (Tr. 210-21, 235-36, 590, 592, 597-98, 656).*

On Sunday, February 8, 1976, Riker, Erm, O'Brien, Giordano, Wolfie and another, again assembled at the Hamiltons' house to continue unloading the trailer. They had with them a flatbed truck, a panel truck, a pickup truck, and a station wagon upon which they loaded more of the fresh hams, pork and bacon, and several of the seventy-five cases of Agar canned hams which had been unloaded the night before by Hamilton at one of the men's request. (Tr. 216-18, 220-23, 283, 308, 336-37, 473, 598; GX 10A). The several men, except for Hamilton, then drove off with their cargo.

4. Monday, February 9, 1976: the arrest of Riker and Erm's delivery of \$400

Responding to information supplied to him by a confidential informant, Special Agent Eugene Fitzpatrick of the Federal Bureau of Investigation located and surveilled the stolen trailer at Fisher Avenue on Monday morning, February 9, 1976. (Tr. 876-78). From near the intersection of Prospect Street and Fisher Avenue, Fitzpatrick observed Hamilton and Michael Betz at the trailer and thereafter saw them drive away in Betz' car. He also saw Riker drive up to the vicinity of the trailer in his Dodge Sedan. (Tr. 879-80). Fitzpatrick

* At trial, Ronnie Hamilton testified that his then present recollection was that one man, O'Brien, came over to the house after Riker left, but that there might have been two men. (Tr. 212, 272). Joy Hamilton distinctly remembered that two men came over and introduced themselves as brothers-in-law. She identified O'Brien as one of the two, but was not certain whether Giordano, who in fact was O'Brien's brother-in-law, was the second. (Tr. 590, 592, 597-98). Both Hamiltons had previously and independently selected photographs of O'Brien and Giordano as the men who had come over to Fisher Avenue on Saturday night after Riker's departure. (Tr. 936-39; GX 8B, 8D).

was unable to see the tractor parked in Hamilton's garage until he drove down another street parallel to Fisher Avenue. (Tr. 880).

In the meantime, Hamilton and Riker, unaware of Fitzpatrick's watchful surveillance, proceeded to sand down the side door of the tractor and to work on replacing the ignition into the dashboard of the cab. (Tr. 415-16). Riker also unloaded some more of the meat cargo and placed several large fresh hams into the trunk of his car. (Tr. 223-25; GX 6A, 6B).

At approximately 2:00 p.m., Fitzpatrick and other agents who had joined him in the meantime, approached the trailer where they found Hamilton and Riker standing by the open door of the trailer. Riker had a meat hook in his hand, and upon a pat-down search for weapons, Fitzpatrick found in Riker's possession a lock and key of the exact same make and kind as the one that fastened the second door to the trailer. (GX 1, 4A; Tr. 882).

After Riker had twice been advised of his constitutional rights and before he was placed under arrest, he told Fitzpatrick that he did not know what was on the trailer and then proceeded to explain to Fitzpatrick how he claimed to have come into possession of the tractor-trailer unit.* (Tr. 919, 921, 929-33). Riker was

* Prior to the introduction of Riker's statements, the Court held a "voluntariness" hearing pursuant to Riker's request. Following testimony by Fitzpatrick and Riker, Judge Owen ruled that the statements were made voluntarily. (Tr. 779-80). Incredibly, Riker testified at this hearing, out of the presence of the jury, that he had made no statements to Fitzpatrick or to any other law enforcement official on February 9, 1976—testimony which he later contradicted before the jury. See *infra* at 15-16 (Tr. 718-20, 731-33, 1349-50, 1390-92).

then placed under arrest at which time he had in his possession \$738 in cash.*

After Riker, Hamilton and Michael Betz were arrested,** the agents left with the three men for New York City, leaving one of their number to guard the tractor-trailer until a representative of the shipper arrived.*** (Tr. 897-98). While waiting for the shipper's representative FBI Special Agent Edward Doherty observed O'Brien and another man (later conceded to be Giordano) drive-up to the house in a station wagon and leave immediately. (Tr. 889-92). Shortly later O'Brien returned to 15 Fisher Avenue and, upon challenge by agent Doherty, O'Brien told him that he was up to inquire about a "dog for sale." (Tr. 602, 891). O'Brien immediately left after his brief conversation with Doherty.

On Monday night, February 9, 1976, after the agents had all departed and the tractor-trailer had been removed, Erm and another arrived at 15 Fisher Avenue. Erm handed to Joy Hamilton \$400 in cash which he said was "George's" "cut" or "share" for the meat that had been sold.**** Upon being advised by Joy Hamilton that Riker

* Before Riker was brought down to the Metropolitan Correctional Center for the night, he told another agent that there were hams in the trunk of his car and voluntarily turned over the keys to the car. (Tr. 1042-43; GX 6A, 6B).

** Although Betz was arrested, the Government later dismissed a complaint filed against him with the Magistrate. Hamilton was advised in September, 1976 that the Government would not prosecute him, provided that he testified truthfully at trial. (Tr. 290-91).

*** The tractor-trailer was later transported to South Kearney, New Jersey. The next day, the remainder of the shipment was delivered to the appropriate recipients, with a total loss of over \$16,000 (Tr. 97, 116-117; GX 20D, 21C).

**** In addition to the Hamiltons' in-court identification of Erm, the Government offered proof that in July, 1976, Ronnie and Joy Hamilton each independently identified Erm (whose facial appearance had changed considerably at trial) from a photospread. (Tr. 959-62).

and her husband had been arrested, Erm cautioned Mrs. Hamilton not to tell anyone that "we were here." (Tr. 603, 608-09, 785-86). Two or three days later, after Riker's release on bail, he returned to the Hamilton's house and picked up the \$400 from Mrs. Hamilton. (Tr. 609).*

5. Erm's statements to Agent Colitre

On June 29, 1976, defendant Erm—who had not been arrested—was interviewed at his place of employment by Special Agent Charles Colitre of the FBI. After Erm was advised of his rights and of the fact that he was a suspect in the investigation, Erm told Colitre that he had first been in Nanuet on a Friday night in early February with "another person," ** that he had seen the tractor-trailer at that time and met "Ham," but that he did not know of the contents on the trailer, nor did he receive or obtain any meat over the weekend. Erm fur-

* Although Ronnie Hamilton was home at the time of this subsequent visit by Riker, the two did not converse. At another time later, however, Riker telephoned Hamilton and told him that O'Brien had told the FBI that he was up looking for a hunting dog, and that Hamilton, if asked by anyone, should tell them that in fact he had a dog for sale. (Tr. 288-89, 425-26).

** Erm told Colitre that his first visit to Fisher Avenue was occasioned by a phone call from Riker, and that while en route to Fisher Avenue, Riker asked Erm if he was interested in purchasing some cartons of hams, 6 cans to a carton at approximately \$60-75 per carton. Erm further told Colitre that he assumed from the circumstances that this meat had been stolen. Out of an excess of caution, the Government voluntarily advised the court and defense counsel that it would not seek to elicit these statements in its direct case to avoid any possible problem under *Bruton v. United States*, 391 U.S. 123 (1968). (Tr. 820-23). Subsequently, after Erm testified, the Government offered these statements in its rebuttal case to impeach Erm's testimony, but again without specific reference to Riker. See *infra* at 16-17.

ther told Colitre that he had returned to Fisher Avenue on Sunday night and, upon learning of Riker's arrest, left \$400 for Riker which he owed to him as a business debt, along with some motorcycle parts for Hamilton. (Tr. 817-19, 824-25, 843).

B. Defendant Erm's Case

Defendant Erm called five witnesses including a character witness and himself.

William Traut testified that on Saturday, February 7, 1976, he was with Erm at the latter's shop in Caldwell, New Jersey, from 2:00 p.m. to approximately 9:00 p.m. and that Erm did not leave his presence at any time before 9:00 p.m. that night. (Tr. 1071-73). On cross-examination Traut claimed to recall specifically that he was with Erm in the shop on randomly selected days throughout January, March, May, and June of 1976, although he was not an employee of Erm's and was just a visitor to the store. (Tr. 1086-81). Traut further claimed that he was with Erm at the shop on Monday, February 9, 1976, from late afternoon until 11:00 o'clock that night, in direct contradiction of Erm's own subsequent testimony that he visited Fisher Avenue on that Monday night to leave \$400 with Joy Hamilton. (Tr. 1076-77, 1164-69).

Salvatore Cottone, a friend of Erm's, testified that he joined Erm and Traut at Erm's shop on Saturday night at approximately 8:00 p.m., and later that evening went to dinner with Erm and his then girlfriend. (Tr. 1084-86). On cross-examination, Cottone admitted that he did not know when Erm arrived at his shop that Saturday.*

* Cottone further testified that he was with Erm on Sunday, February 8, 1976 at a time that Erm later stated he was with Riker at a beefsteak dinner. (Tr. 1091-92, 1159-61).

Bonnie Erm, the defendant's wife of eight months, claimed to have seen Erm at the shop on Saturday, February 7, 1976, at around 7:00 p.m. Mrs. Erm, however, later testified that at the time she saw Erm that Saturday night he was with Traut and Cottone—a time placed by Cottone as no earlier than 8:00 p.m. (Tr. 1098-99, 1102).³

Harold Erm, the defendant, testified in his own behalf. Erm stated that in February, 1976, he was attempting to sell inventory from his motorcycle repair shop, Custom Choppers, and in connection with these efforts he talked to George Riker, an acquaintance who had previously performed chrome plating work for Erm. (Tr. 1106-09, 1113-24). On Sunday, February 8, 1976, Riker invited Erm to accompany him to visit a friend named "Ham" who had a cycle shop and who might be interested in purchasing parts from Erm. Erm accepted the invitation and, after joining Riker at a benefit dinner in New Jersey, accompanied him to Fisher Avenue in Nanuet, where he was introduced to Hamilton. Erm testified that he saw the tractor-trailer unit near Hamilton's house, but did not approach it, nor did he help unload or receive any meat from the trailer. (Tr. 1125-29, 1160-61, 1161-

* Traut, Cottone and Mrs. Erm were called as witnesses to buttress Erm's apparent "alibi" defense that he was in his shop in Caldwell at the very time Ronnie Hamilton testified he had met Erm with Riker at the trailer in Nanuet. Cottone and Bonnie Erm, however, merely placed Erm in Caldwell at a time *after* Hamilton had helped Riker and Erm unload the trailer. The jury was plainly entitled to reject Traut's testimony—the only witness other than Erm who placed Erm in Caldwell between 6:00 and 8:00 p.m. on Saturday, February 7, 1976 when the trailer meeting took place—since his claimed recollection of specific days when nothing consequential occurred simply defied belief. Indeed, as noted earlier, even Erm's own testimony squarely belied Traut's clear recollection that Erm was with him until 11:00 p.m. on Monday, February 9, 1976, another date of significance.

64). Erm admitted that he returned to Fisher Avenue on Monday night, but claimed that his purpose was to deliver motorcycle parts he had promised to Hamilton the night before. He asserted that the \$400 given to Joy Hamilton was a business debt owed to Riker and had no connection to the stolen cargo of meat. (Tr. 1164-69). Erm flatly denied that he had been at Fisher Avenue on Saturday night (tr. 1120) and claimed that when interviewed in June, 1976, by Colitre he told Colitre that he had been to Fisher Avenue on two consecutive nights. Erm also testified that during this interview Colitre had requested him to sign the agent's notes and that he had complied with this request, as well as initialed two mistakes in the notes. (Tr. 1172-74). Finally, Erm stated that he had never seen O'Brien or Giordano prior to the indictment in this case. (Tr. 1175).

On cross-examination Erm testified that he had not expected to meet Riker at the Hamilton's house on Monday night and that he knew where Riker worked and how to reach him. (Tr. 1196, 1200). Erm stated that he was "positive" he never had told Colitre in the June interview that he had a conversation with Riker or with anyone about meats and hams on his first visit to Nanuet in February, and further "positive[ly]" denied that any such conversation had taken place with anyone. (Tr. 1186-88, 1219, 1230).

C. Defendant Riker's Case

Defendant George Riker's case consisted of the testimony of three character witnesses, Riker's brother, his partner from the chrome plating business and the defendant himself.

Warren Riker, the defendant's brother, testified to a conversation with the defendant on Thursday night, February 5, 1976, in which George Riker told the wit-

ness that he had just received a phone call from "Drew" and was going to meet him. (Tr. 1234-36). Warren Riker further testified that on Saturday his brother received another phone call at his place of business and that George then told him that "Drew" said there is meat on the tractor-trailer. (Tr. 1248). John Ardito, defendant Riker's partner in Quality Plating Co., a chrome plating shop, was called as a witness to corroborate the Saturday phone call to George Riker. Ardito, however, could testify only that Riker said "a fellow" had meat on the truck and that Riker wanted to know if Ardito wanted any meat. (Tr. 1265-66, 1289-90). Ardito also testified that he had met a customer named "Drew" in December 1975, when Quality performed some work for him. (Tr. 1259-61).

Cross-examination of Warren Riker and Ardito established that neither had spoken with the alleged caller on Thursday or Saturday, (tr. 1250, 1289-90), and that as of Saturday neither knew that Riker was doing any work on a tractor-trailer unit. (Tr. 1249, 1296-97).

Defendant George Riker, testifying in his own behalf, explained that Drew Holbrook was a customer of his for whom he had previously chromed tractor parts. In December, 1975, Holbrook told Riker that he would soon have another tractor to be chromed. On February 5, 1976, in response to a phone call from Holbrook, Riker drove to the Golden Star Diner where he met Holbrook, who was in possession of a tractor-trailer. With Holbrook at the wheel of the tractor, the two then drove to Hamilton's house in Nanuet, where Holbrook quickly abandoned the tractor-trailer to leave in a car waiting there for him. (Tr. 1307-10, 1311-16). Riker testified that on Saturday, February 7, 1976, he received a call from Holbrook who told him that the tractor-trailer was a repossessed unit, that there was meat on the

trailer, and that he (Holbrook) would be sending men up for the meat that night. Riker admitted he was at Hamilton's house on Saturday night, but claimed that he did not see Erm there, did not participate in unloading the trailer, but did see some other cars in the vicinity of Hamilton's house. (Tr. 1322-27). Riker also conceded that he was at Hamilton's house Sunday night with Erm, but again asserted that he did not help unload the trailer or take any meat. Finally, according to Riker's description of the events of Monday, February 9, 1976, it was Hamilton who tried to sand the door of the tractor to remove the rightful owner's name. Riker admitted that in telling Fitzpatrick he did not know what was on the trailer he had lied, but claimed to have done so because he was upset.

On cross-examination Riker was confronted with and impeached by a host of prior inconsistent statements: to Fitzpatrick on February 9, 1976, in the Grand Jury on April 8, 1976, and in the hearing before Judge Owen on December 17, 1976. Thus, for example, on February 9, 1976, Riker told Fitzpatrick that he met Holbrook at Reinauer's truck stop—located on Route 17 in New York—(as opposed to his trial testimony of a meeting at the Golden Star Diner) (tr. 1348); that he had not been at Hamilton's house between Saturday and Monday (as opposed to his trial testimony that he was at Fisher Avenue on Sunday night) (tr. 1377); and that Riker and Holbrook were followed from the pickup stop to Fisher Avenue by a black Cadillac or Lincoln Continental, in which car Holbrook allegedly made his quick get-away from the Hamilton's house (as opposed to his trial testimony that he did not see the car until he arrived at Hamilton's house) (tr. 1347-48).^{*} Similarly, in the Grand Jury Riker testified that

^{*} Riker denied that he made this last statement to Fitzpatrick. Fitzpatrick, however, testified that Riker told him he observed the car as soon as he met Holbrook at Reinauer's truck stop. (Tr. 929-30).

he received the Thursday phone call from Holbrook at 7:00-7:30 p.m., and thereafter arrived at the diner at 8:30-9:00 p.m. (as opposed to his trial testimony that the call came after 8:00 p.m. and that he arrived at the diner at 9:30-10:00 p.m.) (tr. 1341-45); that he arrived at Fisher Avenue on Thursday night between 10:30-11:00 p.m. (as opposed to his trial testimony of an arrival at 11:30-12:00 p.m.) (tr. 1359-60); and, that he saw a pickup truck with several people over by the trailer on Sunday night (as opposed to his trial testimony that he did not see anyone at the trailer on Sunday) (tr. 1378). Finally, Riker was confronted with the dramatic conflict between his testimony before Judge Owen at the voluntariness hearing only three days earlier that he had not explained to any law enforcement official on Monday, February 9, 1976, how he came into possession of the trailer, and his present admissions on cross-examination that in fact he told the Holbrook story to Fitzpatrick on February 9th. (Tr. 1349-50, 1390-92).*

D. The Government's Rebuttal Case

In rebuttal, the Government recalled agent Colitre who testified that in the June 29th interview, Erm told him that on his Friday night visit to Fisher Avenue he had had a conversation with "another person" ** who

* Riker's testimony was peppered with further serious and irreconcilable contradictions of his February 9th statements and his April 8, 1976 Grand Jury testimony. See, e.g., Tr. 1337-38, 1340, 1361. Riker was also cross-examined about the general implausibility of his Holbrook story: e.g., that he had not heard from Holbrook since Saturday, February 7, 1976, nor did he know the name of Holbrook's company or its business address (Tr. 1357-58).

** See *supra* at 10 n.**.

asked him if he wanted to buy cases of canned hams at a price of \$60-\$75 per case. (Tr. 1445).*

E. Erm's Surrebuttal Case

In surrebuttal, defendant Erm was recalled and testified that his Fisher Avenue conversation about hams was with Hamilton. Erm claimed that he had only been asked during cross-examination the day before about such a conversation with Riker, and no one else, and that if he had issued a blanket denial to such a conversation with "anyone," his testimony was false. (Tr. 1464-65, 2468-69).

Erm's surrebuttal testimony was refuted by Colitre, who again was recalled and who testified that the person with whom Erm said he had had the "ham" conversation definitely was not Hamilton.

ARGUMENT

POINT I

The District Court Properly Admitted The Prior Consistent Statement of Witness Ronnie Hamilton.

Riker and Erm claim error in the trial court's admission of the February 10, 1976, post-arrest statement of witness Ronnie Hamilton to an Assistant United States Attorney as a prior statement, consistent with Hamilton's trial testimony and offered to rebut an implied suggestion of an improper motive to testify falsely. This claim is without merit.

* Colitre also denied that he had ever shown his notes to Erm or asked him to sign or initial them during the interview, and contradicted Erm's claim that he had visited Nanuet on "consecutive" days. (Tr. 1443-44).

The prior consistent statement was introduced in the following circumstances: near the end of a wide-ranging cross-examination of Ronnie Hamilton, counsel for defendant Erm asked Hamilton when he had first learned that the charges in this case would be dismissed against him, and what, if any, conversations he had had with his own counsel, the Government, or anyone other than his wife about the dismissal of charges. (Tr. 326-30). After Hamilton confirmed he had first been advised that he would not be prosecuted in September, 1976,* and, in response to a question from defense counsel, that he was relieved by the decision to drop the charges, Erm's counsel soon asked Hamilton whether he was sure Erm had been at Fisher Avenue on Saturday night. Indeed, counsel asked: "You say now here under oath that you had in fact seen him [Erm] before . . .?" (Tr. 341). This inquiry was followed by cross-examination by counsel for Riker who also attempted, in the course of a sprawling examination, to impeach Hamilton's testimony with at least two allegedly prior inconsistent statements relating to conversations between Riker and Hamilton.

On redirect examination, Hamilton was shown GX 3522, a form "Statement Before Arraignment" of the United States Attorney's office, which Hamilton identified as containing the statement given orally by him and written down by an Assistant United States Attorney on February 10, 1976, the day after Hamilton's arrest and immediately prior to his arraignment on the complaint. Hamilton adopted the statement as the same he had given

* On direct, the Government properly elicited the extent of promises made to Hamilton: that he would not be prosecuted for his role in this case, so long as he testified truthfully, but that false testimony would subject him to prosecution for perjury. (Tr. 290-91). See e.g., *United States v. Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969).

and read on February 10, 1976, and testified that the substance was largely in his own words.* The Government offered the statement, and after extensive colloquy, the District Court later allowed a redacted copy of the statement to be read—but not exhibited—to the jury.**

Rule 801(d)(1)(B) of the Federal Rules of Evidence allows the admission of a prior consistent statement of a witness if it is "offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." Defendants assert that Hamilton's prior statement should not have been admitted because (i) no counsel sought to impugn Hamilton's testimony as recently fabricated or improperly motivated, and that, (ii) the prior statement did not antedate Hamilton's motive to testify favorably for the Government. These arguments do not withstand analysis and manifest a misunderstanding of the rules governing admission of prior consistent statements.

First, it is clear that a significant thrust of defense counsels' cross-examination was to suggest that Hamilton was not telling the truth and was employing a selective and expanded memory of events. This attack on Hamilton's credibility, joined with the inquiry on cross-examination by counsel for Erm into the timing and nature of Hamilton's agreement with the Government, had the clear—and obviously intended—effect of at least implying to the jury that Hamilton had a real motive to slant his testimony: the September, 1976 assurance from the Government that he would not be prosecuted if he testified

* The statement, which is reproduced in the Government's Appendix, had not been signed by Hamilton.

** The statement was not read to the jury until the completion of both defense cases, a procedure not objected to by counsel. The delay in reading the statement to the jury was occasioned by the court's review and excising of portions of the statement.

truthfully. Indeed, in his opening to the jury, counsel for Erm framed this very argument for the jury:

"Consider as you listen to them [the witnesses] whether they have any interest in the outcome of this case, whether they were promised anything to testify in this case, whether they have any stake in the case, so to speak. You heard, for example, that a large part of this took place at Mr. Hamilton's house, that he and his wife will testify, and, as Mr. Jossen said, neither Mr. nor Mrs. Hamilton have been prosecuted. You will have the right throughout the end of the case and at the end of the case to ask yourself why, why is that?" (Tr. 17).

Thereafter, in summation, counsel completed the thought suggested throughout the defendants' case and made explicit to the jury his argument that Hamilton had a motive to lie:

"Was Ronnie Hamilton * * * telling the absolute unvarnished truth about Mr. Erm when they testified. * * * You have to judge what their motive is to testify, whether they are pure of heart, whether they care, whether they have gotten anything, *be it so subtle as a dismissal of a charge against Mr. Hamilton* * * *, all their motivations to testify the way they do." (Tr. 1627. See also, Tr. 1629-30, 32). (Emphasis added).

Moreover, during argument on the point, the district judge noted that he was "perfectly clear that Ronnie Hamilton was attacked by anybody who was of a mind to" with the implication that the immunity conferred upon him influenced his testimony (Tr. 1058). When directed to the portions of the transcript concerning Erm's inquiry into the promise of no prosecution,

the Court responded: "Yes, I think that disposes of it." (Tr. 1063). Finally, by the time the prior statement was actually read to the jury, there could be no doubt that Erm's and Riker's defenses subsumed the contention that Hamilton was not telling the truth. Erm and Riker each had testified and squarely contradicted Hamilton in certain critical areas of his testimony. Thus, the intimation of at least one defense counsel—and a cornerstone of each defendant's case—was not only an implied, but an expressed, charge of improper motive.*

Defendants' argument that no counsel impugned or attacked Hamilton's testimony as recently fabricated, misreads both the record here and the predicate for admission of a prior consistent statement. Under the Federal Rules of Evidence, it is sufficient if a suggestion of improper motive or bias has been made; and, the suggestion need not be made explicitly, but only impliedly.** *United States v. Rodriguez*, 452 F.2d 1146, 1148-49 (9th Cir. 1972). In the circumstances of this case, the experienced district judge correctly determined that it was proper to admit the prior consistent statement—made

* Counsel for Riker also suggested a recent fabrication by Hamilton with respect to Riker's damaging post-arrest statement to him to tell anyone who asked that he had a hunting dog for sale. See, *supra* at 10 n.*. Hamilton was cross-examined on this point with reference to his earlier grand jury testimony in which it was stipulated that Hamilton had not mentioned this conversation. See, *infra* at 34.

** Taken at face value, defendants' contention is no more than that absent a "smoking gun" question on cross, no real suggestion of improper motive or recent fabrication can be made. This argument is contrary to the express language of Fed. R. of Evid. 801(d)(1)(B) and, if adopted, would surely allow defendants to mislead a trial jury on questions of credibility. In short, as the district judge here found, the attempt to tie an attack on Hamilton's credibility with an alleged motive created by the Government's promise to him had surely been made apparent to the jury, even without a directly accusatory question to that effect.

long before Hamilton had been assured by the prosecution that the charges against him would not be pursued—to rebut the plain inference that his testimony was jaundiced by dismissal of the complaint.

A trial court is vested with broad discretion in its determinations to admit or to exclude prior consistent statements. *United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972). See also, *United States v. Lombardi*, 550 F.2d 827 (2d Cir. 1977). Here, Judge Owen properly exercised his discretion: he heard extensive argument on the question, reviewed the transcript of cross-examination, and, with an ability to discern the thrust and impact of the testimony on the jury that an appellate court cannot do on the basis of a cold-record, cf., *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976), determined that such an attack had been made on Hamilton and that his prior statement should be read to the jury. By no stretch of imagination can this determination be said to have been an abuse of discretion.

Riker's and Erm's contention that the prior consistent statement did not antedate Hamilton's motive to testify favorably for the Government is equally misguided. Defendants rest this claim on testimony from Joy Hamilton that *she* had been told by an FBI agent on February 9, 1976, the day of Hamilton's arrest, that he probably would not be prosecuted. But, there was no evidence in the record that Ronnie Hamilton had been similarly advised: Hamilton was separated from his wife that day, was taken to the Metropolitan Correctional Center to await arraignment the next day, and Hamilton himself testified that the first time he was told by someone in the Government that he would not be prosecuted was in September, 1976. (Tr. 327-28). Moreover, even if Hamilton had heard the agent's comment on February 9th, the accuracy of that remark surely would have been dis-

pelled in Hamilton's mind by the fact that he *was* arrested and then arraigned on a criminal-felony charge on February 10, 1976—the day he gave his statements to the Assistant United States Attorney.

Finally, the agent's statement, even if heard by Hamilton on February 9, 1976 and sufficient to have created in Hamilton's mind a motive to talk, created no more than a motive for Hamilton to deny knowledge that the tractor-trailer and its cargo had been stolen; there was no mention in the agent's statement to Joy Hamilton that a declination of prosecution would hinge on cooperation—i.e., testifying against Riker, Erm and the other co-defendants. By Erm's cross-examination of Hamilton, it was clearly possible for the jury to understand a claim that Hamilton's trial testimony was specifically motivated by a need to convict Erm as a part of Hamilton's understanding with the Government—an interest that was totally absent on the day of Hamilton's arrest.* It is well-established that the jury must be given every opportunity to consider prior consistent statements whenever it is "reasonably possible" for the jury to find that a proffered prior consistent statement was made before the motive to fabricate or contrive arose, or, if there are several motives for falsifying ascribed to the witness, before any one of the motives arose. *United States v. Lombardi*, *supra*; *United States v. Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); *United States v. Fayette*, 358 F.2d 728, 735 (2d Cir. 1968). See also, *Applebaum v. American Export Isbrandtsen Lines*, 472 F.2d 56, 61 (2d Cir. 1972); *United States v. Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973); *United States v. DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970),

* Indeed, Erm was not arrested on February 9th and was not charged until the filing of the indictment in July, 1976. Hamilton knew Erm only to describe him and by the nick-name "Fat Harold" which he had heard on Saturday, February 7, 1976.

cert. denied, 402 U.S. 950 (1971); *United States v. DeLaMotte*, 434 F.2d 289, 293 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *DiCarlo v. United States*, 6 F.2d 364, 367 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). The jury here was plainly entitled to find that Hamilton's post-arrest statement was made before he had a motive to inculcate Riker, Erm, or anyone else in return for dismissal of the charges against him. Defendants' claim that Hamilton's February 10th motive to fabricate—to seek leniency—was the same as that which existed at trial, perhaps while “appropriate enough in summation to a jury,” was nevertheless “insufficient to form a basis for the rejection of the [prior statement] as a matter of law.” *United States v. Grunewald*, *supra*, 233 F.2d at 566; *United States v. Lombardi*, *supra*.

In the final analysis, Erm's and Riker's claims of prejudice on this issue are greatly exaggerated. The prior statement as read to the jury was completely redundant of Hamilton's testimony on direct examination. Cf. *Railway Express Agency v. Epperson*, 240 F.2d 189, 193-94 (8th Cir. 1957). To the extent that defendants claim the probative value of this statement was diminished by Hamilton's motive to lie on February 10, 1976, that argument could have been made to the jury by counsel. Finally, the sharp conflict between Hamilton's testimony, on the one hand, and Erm's and Riker's on the other, was present even absent the prior statement on the strength of Hamilton's direct testimony alone. As matters developed at trial the evidence of guilt against both defendants was compelling—including the demonstrable perjury by Erm and Riker in other important areas unrelated to Hamilton. Thus, the prior statement was of relative insignificance here, and surely the admission of this evidence does not warrant the reversal which both defendants seek.

POINT II**The Trial Court's Charge Was Correct and Fair.**

Erm and Riker assail various portions of the trial court's charge which they assert were either legally incorrect or unfairly prejudicial to them. These claims are all without merit.

A. The Trial Judge Properly Instructed the Jury on the Inference Which May Be Drawn from Possession of Recently Stolen Property.

Tracking language expressly approved in *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973), Judge Owen instructed the jury on a permissible inference "you are never required to make," that possession of recently stolen property, "if not satisfactorily explained," is a circumstance from which "you may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence" that the possessor knew the property had been stolen. (Tr. 1694-95). In this Court, Riker and Erm claim that the giving of this instruction, without reference in the charge to their own testimony, was error which requires reversal of their convictions.

First, it bears emphasis that in the District Court, while both defendants opposed the "recent-possession inference" charge, neither requested the modification of that charge by specific reference to the testimony of Riker and Erm that is now claimed would have satisfied their respective interests. The failure to have requested such a modified instruction is itself a complete answer to defendants' attack in this Court. *United States v. Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

Second, even reaching defendants' specific complaint, the trial judge was not obligated in the circumstances of this case either to delete the "recent possession" charge, or to make explicit reference to the defendants' purported explanation of their "possession" of stolen goods. *Barnes v. United States*, *supra*, 412 U.S. at 845 n. 9; *United States v. Boyer*, 485 F.2d 579 (5th Cir.), *reh. denied*, 485 F.2d 688 (1973); *United States v. Brawer*, 482 F.2d 117, 129-30 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974). While Riker claimed that he had come into possession of the tractor-trailer unit under circumstances arguably* consistent with his chrome-plating business, he specifically denied having divested the trailer of its meat cargo prior to Monday, and possession of the meat cargo itself bore absolutely no relationship to his line of business. Similarly, Erm explicitly denied knowing of the contents of the trailer at any time over the weekend, or having any of the meats in his possession. Thus, this was not a case like *Freije v. United States*, 386 F.2d 408, 410 (1st Cir. 1967),** upon which defendants rely,

* Riker's claim in this Court that his possession of the tractor-trailer unit was consistent with his general business to possess tractor and trailers (R. Br. 17) is simply not supported by the record. Riker testified that he chrome-plated parts that were brought to him; not that the vehicles themselves were brought to him to keep in his custody. (Tr. 1307-10). Indeed, he claimed not to have known that a trailer was to be turned over to him by Holbrook until the night of February 5, 1976 (Tr. 1353), and that, as far as he was concerned, the tractor and trailer themselves had been entrusted to Hamilton, not to him. (Tr. 1387-88). Thus, Riker's possession of the tractor-trailer unit, far from consistent with his own business, was an extraordinary set of events out of place of his normal chrome-plating dealings.

** To the extent that *Freije* may be read as setting forth a rule that whenever a defendant has offered some explanation of his possession of stolen goods, the "recent-possession" inference charge must be modified, this reading does not square with *Barnes*, *supra*, or with this Court's decision in *Brawer*, *supra*.

where defendants in effect admitted actual possession of the stolen goods in question but claimed that such possession could be properly and completely explained by the nature and conduct of their ordinary business. Here, as Judge Owen observed (Tr. 1487), the jury could reject Riker's and Erm's testimony and still find need for the "recent-possession" inference in order to conclude knowledge of the defendants that the goods were stolen. Moreover, crediting the Government's proof on the point, Riker's and Erm's activities over the weekend—unloading and carting away the produce at a residential area distant from Riker's shop, and Erm's payment of \$400 to Joy Hamilton for Riker—were hardly consistent with innocent possession of the cargo in the course of either defendant's regular business. *United States v. Brawer, supra.*

Finally, Judge Owen's charge on the inference can in no manner be said to have shifted the burden to defendants, or prejudiced them. The court expressly told the jury that they need not draw the inference, but could do so only if they found it appropriate. The district judge had not been asked to and did not marshal the evidence or comment upon the merits of the contentions of either side. The inference instruction, to which the Government was in any event entitled with respect to defendants O'Brien and Giordano, did not suggest to the jury that defendants' explanations should be rejected, but generally invited the jury to evaluate whether the inference was "warranted" under all of the "facts and circumstances shown by the evidence. . . ."

B. The District Court's Instruction on "Possession" Was Correct

Erm argues that the trial court committed error in its instruction on the meaning of "possession," when it charged that the jury could find "possession of the stolen

meats if the defendant, *inter alia*, "controlled the location of the tractor-trailer. . . ." (Tr. 1693). He claims that under section 659, no theft could have occurred until the meats were physically removed from the trailer and that, *a fortiori*, Erm could not have received or been in possession of such stolen property before the goods had been taken from the truck. This contention is plainly wrong.

In *United States v. Padilla*, 374 F.2d 782 (2d Cir. 1967), this Court specifically rejected the argument pressed by Erm on this appeal. In affirming defendant's conviction under section 659 where the defendant had removed two pairs of slacks from a carton, but not from the truck itself, the Court in *Padilla* ruled:

"[T]he phrase 'from any * * motortruck' as used in the context of the statute does not, as Padilla contends, require that the goods be physically removed from the vehicle—that is to say actually taken out of it—before the crime of theft or unlawful taking from interstate commerce can occur. While the preposition 'from' may be used to indicate physical removal or asportation it is not so used here. An ordinary and usual meaning of 'from' is to indicate a starting point. * * * That is the sense in which it is used in § 659—to indicate the facility in which the theft or taking from interstate commerce must initiate in order to have the statute apply."

374 F.2d at 784-85. See also, *United States v. Sinacola*, 476 F.2d 307 (7th Cir. 1973); *United States v. Fusco*, 398 F.2d 32 (7th Cir. 1968); *United States v. De Normand*, 149 F.2d 622 (2d Cir.), *cert. denied*, 326 U.S. 756 (1945). Under *Padilla* and *De Normand* the jury was entitled to find that the cargo here had been stolen "from" the tractor-trailer as soon as any defendant ex-

exercised dominion or control over the tractor-trailer with intent to deprive its rightful owner of such property. Accordingly, the jury *a fortiori* was entitled to find "possession" or "receipt" of the stolen goods when any defendant thereafter had control of the location of the unit and its contents. The trial judge's instruction on this matter was clearly proper.*

C. The Trial Court's Charge On Reasonable Doubt Was Fair

Both Riker and Erm allege that the trial judge's charge on reasonable doubt and his subsequent instruction that the jury should not "hesitate" to acquit if the Government had not established a defendant's guilt beyond a reasonable doubt, but on the other hand, should not hesitate to convict if the law had been violated as charged, were inflammatory and require reversal. These claims are frivolous. The reasonable doubt language, which included a fair statement that "reasonable doubt" does not mean "a positive certainty or beyond all possible doubt," was not specifically excepted to at trial, and, in any event, when read in the entirety of the charge on

* In any event, the Government's proof unquestionably showed that Erm, as did the other defendants, actually had removed the stolen meat from the trailer, carted it away, and indeed shared in the monetary profits from these spoils several days after the tractor-trailer had been taken from New Jersey. Moreover, read in context, the district judge was merely summarizing the Government's contentions with respect to possession, which included the principal claim that each defendant had "physically removed the meat from the tractor-trailer to dispose of it as they pleased," (Tr. 1693) and in fact charged as one of the essential elements which the jury had to find before it could convict, that the meat was "stolen from the * * * tractor-trailer." (Tr. 689-90). On this record it is beyond peradventure that the jury found actual possession of the stolen property with respect to each defendant who was convicted.

this topic, unquestionably conformed to time-honored language approved by this Court. *See, e.g., United States v. Magnano*, 543 F.2d 431, 436-37 (2d Cir. 1976). Similarly, the court's advice that the "public is entitled" to enforcement of the laws, was fairly balanced against the court's direction, in the same context, that the jury should "not hesitate for any reason to return a verdict of acquittal," if it failed to find beyond a reasonable doubt that the law had been violated. This one brief and sterile passage was not inflammatory and neither prejudiced the defendants, nor detracted from a charge which was eminently fair and impartial in all respects. *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954).

POINT III

The District Court Properly Denied Defendant Erm's Belated Motion for a Severance.

On the morning of the seventh trial day in this nine day trial, defendant Erm, for the first time, moved for a severance pursuant to Fed. R. Crim. P. 14 on the ground that his co-defendants, O'Brien and Giordano, would offer exculpatory testimony at a separate trial of Erm, but had themselves decided not to testify at the present trial. Erm contends that the District Court erroneously denied this motion. The record here plainly shows that the trial judge's decision was a fair and proper exercise of his discretion.

It is settled law that the grant or denial of a motion for severance pursuant to Fed. R. Crim. P. 14 is within the sound and broad discretion of the trial judge, whose determination will not be reversed absent a clear abuse of discretion. *Oppen v. United States*, 348 U.S. 84 (1954); *United States v. Taylor*, Dkt. No. 76-1210, slip

op. 2805, 2833 (2d Cir. April 13, 1977); *United States v. Finkelstein*, 526 F.2d 517, 523 (2d Cir. 1975); *United States v. Turcotte*, 515 F.2d 145, 150 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975). In both *Taylor* and *Finkelstein*, this Court set forth four factors as among the indicia to be considered in resolving a severance motion made on the grounds propounded by Erm: (a) the sufficiency of the showing that the co-defendant would testify at a severed trial *and waive* his Fifth Amendment privilege; (b) the degree to which the exculpatory testimony would be cumulative; (c) the likelihood that the exculpatory testimony would be subject to substantial damaging impeachment; and (d) the interests of economy of judicial administration. *United States v. Taylor*, *supra*, slip op. at 2833; *United States v. Finkelstein*, 526 F.2d at 523-24. Application of these criteria to this case makes clear that none supported Erm's belated motion.

First, at the time of Erm's extremely tardy motion, his counsel made no showing—let alone even a representation—that O'Brien or Giordano would waive their Fifth Amendment privilege and testify at a separate trial. While counsel did represent that previously he had been told that O'Brien and Giordano would each testify at *this* trial, no proffer was made with respect to their willingness to waive the Fifth Amendment protection and testify at a separate trial. (Tr. 1136-46). And, given O'Brien's and Giordano's decisions not to waive their privilege at the trial then in progress, there was simply nothing before the trial judge to indicate that either "would be any more willing to waive his constitutional privilege" when called as a witness at a separate trial. *United States v. Finkelstein*, *supra*, 526 F.2d at 524, quoting *Gorin v. United States*, 313 F.2d 641, 646 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

Second, the proffered testimony, if exculpatory at all, would have been merely cumulative. Erm claims that O'Brien and Giordano each would have denied meeting

him prior to arraignment on the indictment, and that this would have contradicted the testimony of Ronnie and Joy Hamilton that Erm and the others had been in Nanuet on Sunday night, February 8, 1976. That claim, however, was already before the jury in the form of O'Brien's and Giordano's statements as testified to by Agent Colitre. Moreover, Erm himself testified that he did not see either O'Brien or Giordano on Sunday night, and denied unloading the trailer the same day, testimony that was subsequently corroborated by defendant Riker as well. Finally, even with the benefit of O'Brien's and Giordano's supposed testimony—assuming it was credited by the jury—Erm still would have placed himself in Nanuet on Sunday night by his own admissions and the jury could still have readily concluded that he was a participant in the unloading of the trailer with Riker and others.

Third, had either O'Brien or Giordano testified they likely would have been subjected to substantial and damaging impeachment. Their respective versions of a visit to Nanuet on Monday, February 9, 1976, to purchase a "dog" that did not exist, and their suspicious and strange actions on that day, at a minimum would have cast grave doubt on the veracity of their testimony.*

Finally, Judge Owen was entitled to consider, as he clearly did, the interest of judicial economy in proceeding with the joint trial. Erm's failure to have raised the severance problem earlier was simply inexcusable—not-

* Thus, for example, the coincidence of O'Brien's claimed sudden appearance in Nanuet to purchase a dog that Hamilton testified he did not own, on the very day that the stolen tractor-trailer was situated at Fisher Avenue, together with O'Brien's quick departure, without further inquiry, upon learning of the presence of an FBI agent, certainly would have been sufficient to raise significant doubts about his testimony in the minds of an average juror.

withstanding his claimed reliance upon O'Brien's and Giordano's intention to testify at this trial, a decision which all defense counsel know is subject to change as tactical and other considerations dictate. The Government had already concluded its case; defendant Erm had completed the testimony of two witnesses; and, there remained only another day and one-half of evidence before the trial concluded. In such circumstances, particularly given the paucity of Erm's showing as to the exculpatory value of O'Brien's and Giordano's testimony, Judge Owen's prompt denial of this belated motion was consonant with the proper conservation of judicial resources and cannot be said to have been a clear abuse of discretion.

POINT IV

The District Court Properly Excluded on Cross-Examination Riker's Self-Serving Post-Arrest Statement to Hamilton.

Riker claims error in Judge Owen's refusal to permit him to elicit a self-serving post-arrest statement to Hamilton on Hamilton's cross-examination. As the District Court noted, when the "dust had settled" around this matter, Riker's claim was much ado about nothing. (Tr. 469-70).

On direct examination, Hamilton testified that he had had a few conversations with Riker after their arrest. The Government elicited from Hamilton that in one of these conversations Riker advised him that O'Brien had told the FBI he was up to Fisher Avenue looking for a dog and that Hamilton then said he would not lie about a dog since he did not have one. (Tr. 288-89).*

* On cross-examination, Hamilton completed the substance of this conversation and testified that Riker told him to tell anyone who might ask that he had a dog for sale. (Tr. 425-26).

On cross-examination, counsel for Riker proceeded to impeach Hamilton with the fact that he had not testified concerning such a conversation in the grand jury, a fact to which the Government stipulated. (Tr. 443-44). In the course of this very cross-examination, Riker's counsel proposed to read aloud to the witness a question and answer from his grand jury testimony that had nothing to do with the "dog" conversation, but which reflected a self-serving post-arrest statement by Riker to Hamilton.* Riker's stated reason in the District Court for reading the question and answer was to impeach Hamilton's credibility. In this Court, Riker now claims that the question and answer should have been elicited under the doctrine of completeness. But, this argument was never advanced by Riker to Judge Owen ** and therefore should not be considered on appeal. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773 (2d Cir., April 11, 1977). However, even if this Court reaches the question, it is clear that Judge Owen properly excluded Riker's self-serving declaration.

First, there was no showing at trial that the disputed statement was made in the context of the same conversation to which Hamilton testified on direct. Thus, even if the rule of completeness had applicability here, it does not support admission of the statement. Moreover, Fed. R. of Evid. 106, to which Riker refers, clearly does not

*The question and answer in the grand jury were as follows:

"Q. Did Mr. Riker say anything to you in those phone conversations about the truck or hams, the trailer?

A. Well, he said to me was, 'Drew must have set him up', because he said, 'I didn't know it was stolen.' He said, 'Drew must have figured he would get away with it.' And that was the extent of his conversation." (GX 3501 Id. at PC-1).

** Indeed, at one point in the argument on the proffered statement, defense counsel stated that he "agree[d]" with Judge Owen that it was not "appropriate" for counsel to seek to introduce a self-serving statement of Riker's that was "not contradictory of anything" (Tr. 434).

apply to oral conversations; in fact, the Advisory Committee Notes to the Rule expressly indicate that oral conversations are excluded from its scope.*

Second, there was no other proper basis to introduce Hamilton's grand jury testimony about Riker's self-serving statement to him. When sought to be elicited by Riker, his own statements to Hamilton were clearly hearsay, as Judge Owen found. Fed. R. of Evid. 801(c). (Tr. 469-70). Moreover, Hamilton did not deny that the conversation took place; when shown his grand jury testimony he testified that he could not recall the "set up" conversation, but that if he testified to it in the grand jury, then the conversation had occurred. (Tr. 446-448, 452-53). Thus, no interest of impeachment would have been served by introduction of Riker's self-serving post-arrest comment.

In sum, Judge Owen had a broad discretion to exclude this evidence as of no or little probative value, Fed. R. of Evid. 403, and to control the proper scope of cross-examination. See, e.g., *United States v. Green*, 523 F.2d 229, 237 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976); *United States v. DeMarco*, 488 F.2d 828, 831 n. 8 (2d Cir. 1973). Furthermore, exclusion of Riker's comment hardly can be said to have caused him prejudice. Hamilton already had testified to Riker's statements during the conspiracy in which he set forth his innocent "Drew Holbrook" story. Riker himself later asserted his innocent involvement from the witness stand and elicited substantial self-serving hearsay comments from his brother and

* Even if the proffered statement was made in the same conversation and even if the completeness doctrine applied, Riker's self-serving comments were properly excluded. Riker's gratuitous remark to Hamilton that he had been "set up" was consistent with his statements to Hamilton during the conspiracy and in no way clarified or gave substance to the circumstances under which Riker was asking Hamilton to lie to the FBI. And, even under the completeness doctrine the statement still would have been inadmissible hearsay.

partner. The self-serving remark disputed here, therefore, would have been no more than cumulative and would likely have been disbelieved by the jury, given the other overwhelming evidence against him and the circumstances of the comment itself.

POINT V

The Trial Judge Did Not Improperly Restrict Defendant Erm's Cross-Examination of Agent Colitre.

Erm argues that the trial judge violated his Sixth Amendment right to confront the witnesses against him by unduly limiting the cross-examination of Agent Colitre in the Government's rebuttal case. This contention is both a distortion of the trial record and frivolous in the extreme.

Colitre, who already had testified in the Government's case-in-chief and had been fully cross-examined by Erm (Tr. 834-48, 863-68, 870-71), was recalled as a rebuttal witness to testify to a limited additional part of Erm's June 29, 1976 statement. Direct examination on rebuttal occupied a scant two and one-half pages of the trial transcript. (Tr. 1443-45). Counsel for Erm then launched a cross-examination which (i) repeated the central point, made in earlier cross of Colitre during the Government's direct case, that his original notes of the interview had been destroyed and (ii) sought to inquire into the agent's interviewing procedures and the specific information in his mind concerning this investigation at the time of the Erm interview. Upon counsel's inquiry into the structure of the Newark FBI office, the district judge at a side-bar conference asked for a proffer as to the relevance of this line. The court thereafter directed counsel not to pursue that area of inquiry, but specifically permitted counsel

to inquire into relevant matters concerning what the agent knew at the time of his interview and, how, in particular, he conducted the interview of Erm. (Tr. 1459-60). Erm's counsel then proceeded to ask a totally irrelevant question* to which an objection was taken and sustained. Counsel then announced that "[f]or reasons expressed at the side bar, your Honor, I have no further questions." The following colloquy ensued:

"The Court: That's your decision, counselor.

Mr. Koelzer: I know it is, but I have to work within the confines of the rulings of the Court, which I respect and obey.

The Court: I authorized you to ask questions in another area, which obviously you decline to pursue.

Mr. Koelzer: Within the limits of the rulings of the Court, your Honor, I have to obey those rulings.

The Court: The record is clear." (Tr. 1461).**

* The question was: "Is it not a fact that you work what you call theft of interstate shipment cases exclusively?"

** Immediately thereafter when the witness was excused, the following colloquy also took place:

"The Court: I want the record to be perfectly clear Mr. Koelzer, that I had authorized you to ask him whether he had read all of the other 302's in this case and was fully familiar with the facts, and that you are privileged to ask him, if you wish, whether he had all of that material fresh in his mind when he interviewed Mr. Erm.

I made it perfectly clear that you were given liberty to ask that at the side bar.

Mr. Koelzer: I understand, your Honor, that those questions were permitted of me after the colloquy.

The Court: And you have made your determination to decline to ask those questions.

[Footnote continued on following page]

Upon this record, the claim that cross-examination was unduly restricted is simply astounding. Here, Judge Owen did no more than properly sustain an objection to a single, irrelevant question, and expressly permitted counsel to inquire into areas relevant to the witness's direct testimony. The subsequent sudden termination of cross-examination was of counsel's own choosing, and cannot be claimed here to have been as a result of the Court's direction or rulings. *United States v. Badalamente*, 507 F.2d 12, 21-22 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

Moreover, such limitations as Judge Owen did place on this second cross-examination of a witness of whose proposed testimony counsel was fully aware from the Government's direct case, were clearly within the broad discretion of the District Court to control the extent of cross-examination. *Alford v. United States*, 282 U.S. 687, 694 (1931); *United States v. Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976); *United States v. Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, 423 U.S. 1074 (1975); *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*,

Mr. Koelzer: Yes, your Honor, in light of the other restrictions on the cross-examination.

The Court: You regard them as restrictions.

Mr. Koelzer: I can only do what I have to do, your Honor, with all due respect to this Court. I obey the rulings of the Court. I do not wish to challenge the authority of the Court, and I wish to be—

The Court: I only ruled on one particular question, and if you chose to abandon any other cross-examination that you had in mind, that is your determination, not mine.

Mr. Koelzer: I understand, your Honor, but, of course, the Court understands that I must of course obey dutifully the rulings of the Court, and that I have chosen to do." (Tr. 1461-62).

424 U.S. 911 (1976). And, a trial judge's determination of the proper scope of cross-examination is entitled to "great deference" and will not be reversed absent a clear abuse of discretion. *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). Here, the witness had already been cross-examined at length concerning the circumstances of his interview,* and the proposed area of inquiry was, at best, a collateral matter designed to sidetrack the jury's attention. In these circumstances, Judge Owen's rulings were sound, fair and clearly a proper exercise of his discretion.

POINT VI

The Sentence Imposed by the District Court on Erm was Proper.

As a final matter, Erm asks this Court to remand his case for resentencing because Judge Owen, in imposing sentence, took account of Erm's obvious and flagrant perjurious testimony at trial, which the trial judge found to be perjurious beyond a reasonable doubt.** This invitation to reconsider the decision in *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975), should be rejected.

In *Hendrix* this court set forth a practical and sensible rule that among the diverse factors properly considered by a sentencing court is a clear finding that the defendant committed perjury at trial. *Hendrix* represents the considered view of seven of the nine Circuits

* Indeed, it is noteworthy that Erm's counsel still had and exercised *two more* opportunities to cross-examine Colitre when the witness was again recalled after Erm's surrebuttal. (Tr. 1473-74, 1475-76).

** Transcript of Proceedings, February 17, 1977 at 14.

that have passed upon the question.* While the Third Circuit recently has embraced the minority view on this subject, *United States v. Adams*, Dkt. No. 75-1821 (3d Cir., April 29, 1977), that decision does not call for reconsideration of *Hendrix*, particularly in the light of recent expressions by this Court that *Hendrix* enjoys continued vitality. See, *United States v. Werker*, 535 F.2d 198, 204 (2d Cir. 1976). Indeed, this Court specifically has declined to expand the *Hendrix* rationale, with respect to specific findings at the time of sentence, to state a broader exception to the normal rule that appellate courts will not review the factors taken into account in imposing sentences. See, e.g., *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976); *United States v. Herndon*, 525 F.2d 208 (2d Cir. 1975).

Moreover, in this case, Judge Owen's finding that Erm had committed perjury was clearly justified. The jury simply could not have convicted either Erm or Riker without concluding that their testimony was false in significant areas. Indeed, contrary to Erm's suggestion, his conscious and deliberate attempt to mislead the jury was outrageous and defiant.** In imposing a prison term of one year, Judge Owen did not rely solely upon Erm's perjury, but upon the "cumulative effect" of several fac-

* Compare, *United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976); *Hess v. United States*, 496 F.2d 936 (8th Cir. 1974); *United States v. Moore*, 484 F.2d 1284 (4th Cir. 1973); *United States v. Cluchette*, 465 F.2d 749 (9th Cir. 1972); *United States v. Wallace*, 418 F.2d 876 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970); *Humes v. United States*, 186 F.2d 875 (10th Cir. 1951), with, *United States v. Grayson*, 550 F.2d 103 (3d Cir. 1976); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969).

** The same can clearly be said of Riker's incredible testimony, which Judge Owen also found in effect to have been perjurious beyond a reasonable doubt. Riker, of course, was the more culpable of the two, as Judge Owen found in imposing a sentence of four-years' imprisonment. (Tr. 1779-80).

tors which described to the District Court "somebody who over the years has been coasting along thinking that he has the system beat * * *."* This finding and the resultant sentence, were proper and reasonable on Erm's richly merited conviction.

CONCLUSION

The judgments of conviction should be affirmed

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ROBERT J. JOSSEN,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

* Transcript of Proceedings, February 17, 1977 at 15.

APPENDIX

**Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976**

Name of Defendant Ronnie Hamilton

STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: Feb 10, 1976

Time Interview Commenced: 12:02 p.m.

Q My name is Ira H. Block, I am an Assistant United States Attorney. You have been arrested for a violation of 18 U.S.C. § 659 which relates to possession of goods stolen in Interstate Commerce. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A Right

Q You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A Right

Q You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A Right

Q You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A Right

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2 10/76

Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976

Q If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A Right

Q Would you like to answer some questions about your background? You may pick and choose those questions you wish to answer, and you may stop at any time. Do you understand

A. OK

Name: Ronnie George Hamilton

DOB: 10/27/47

Marital Status: Married

Social Security Number: 082-38-2969

Spouse: Joy H.

DOB: 12/9/52

Children: 2 14 mos
2 1/2

Address: 15 Fisher Ave
Nanuet, NY 10954

Apt. Private hse

Rent: \$200 mo.

Began Living There: all life except 2 years

Home Telephone: 914-623-7463

Previous Address: Florida, N.Y.

Dates: 1 yr

Employed: unemployed

How Long: since 9/75

I H B

2/10/76

3a

Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976

Previous Employment: W.C. Ott & Co
Carpentry
Montgomery, NY

Wages: \$5000/7 mos.

Parents: Edward & Edna Address: Grahamsville

Who Resides With You? Wife & 2 sons

Welfare? — Self: Spouse

Food Stamps? — Amount: \$95/2 weeks

Unemployment? Yes

Program: Middletown
Location:

Arrests: -1- -2- -3- -4-

Place 9/1968

Fairbanks, Alaska

Charge liquor/beer < 21

Disposition plea of guilty

Sentence \$50 fine

Time Served

Probation

Education:

Years: 4 yrs H.S.

Where: Nanuet

Current Medical Problems:

Physical: None

Mental:

1 H B

2 10/76

*Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976*

Have you taken or are you now taking drugs?

Addict? Heroin () Cocaine (),

Ever Addicted? No drugs Marijuana or Hashinsh ():

What Drug? Amphetamines (),

Drug Program? Methodone (),

Alcohol? occasional beer LSD (), Other:

Do you (or your spouse) have any bank account?

Where: Nanuet National Bank—checking

Financial:

Cash on Person \$.10

Savings **\$3**

Stocks or Bonds —

Car	'55 Olds	'69 Buick	\$500 total
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House —

Other Property —

Does Your Spouse Work? No Where?

Citizen of: US Entry to U.S. Date:

Place of Birth: Pearl River, NY Port of Entry:

Alien Registration Number:

Registered With Selective Service: Yes

Have you ever served in the Armed Forces?

Yes Army

When? 8/1967-8/69

Type of Discharge? Honorable

IHB

2/10/76

*Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976*

Do you have any relatives in N. Y. area, Other than those mentioned above?

Name:

Address:

John Hamilton 34 (bro) E. Green Road Rock Tavern, NY

Charlie Siefert (bro-in-law) 46 Prospect St. Nanuet, NY

When were you arrested? 2/10/76 Where? At home

Do you have any complaints about the way the agents treated you?

Nothing

Would you like to tell me what happened? *

About 3 or 4 weeks ago George Riker told me that he knew a guy who was going to be buying a used tractor trailer and that I could make a couple of hundred dollars by removing some of the equipment from the trailer, tractor, chroming it and then replacing it. I told him OK, I'd be glad to do it.

Around midnight last Thursday, Feb 5, 1976 I got home to find George waiting for me and a tractor trailer parked outside my house. George told me this was the rig I was going to work on and asked me to let him leave the trailer parked outside the house. I said that was OK with me. George then drove the trailer into my driveway.

The next day, Friday Feb 6, 1976 I saw George again and he asked if I knew of a place where the trailer & tractor could be repainted. We drove around the county for a while but couldn't find a large enough garage for rent

* Only the following text was read to the jury, except as noted otherwise. (See, Tr. 1439-42).

*Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976*

At about 9-11 o'clock at night on Saturday, Feb. 7, 1976, George called me at home and then showed up at my place with two other guys I didn't know. The three of them went over to where the trailer was parked. I stayed in the house. Later on I went outside and saw that they had already unloaded some cartons and large green plastic bags from the trailer and were transferring these to a smaller truck. I later learned that the cartons contained canned hams and the plastic bags some kind of fresh ham (hind quarters). One of the two guys with George gave me \$10 for helping him load the hams into the green bags and he also gave me a couple of canned hams (4 cans). After a while the two guys and then George left. Later on that same evening, two different guys showed up and asked if George was there. When I said no, they said George told us it was OK to go to the trailer. Then they asked for the key and I gave them a key which George had left with me earlier that same evening. Then they went outside, stayed there about 1/2 hour, and then came back with the key.

On Sunday, February 8, 1976, during the late afternoon, George, the first two guys from Saturday night and another guy I hadn't seen before, came by and brought a case of beer. A short while later, the second two guys from Saturday night joined us. After a short while more, all of us went outside. I showed them a corner near my garage covered by shade where I had unloaded that morning, at the request of George or the first two guys some of the cartons of canned hams. While all six of them were around, either near the trailer or a pick up truck that the guy I hadn't seen before brought the cartons stacked near the garage were loaded on the pick up

I H B
2/10/76

Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976

truck. Then some of them loaded some more loose hams from the trailer onto the same flat bed truck they had used on Saturday. [Before the six of them left, I asked George about the money I had been promised on Saturday night. George told "Don't worry; I'll find out about it."]¹

On Monday, February 9, 1976, Mike Betts drove over and asked if he could have some of the hams from the trailer. He knew about this from conversation with me during Sunday, early evening. I told him to check with George, whom he knows. Betts and I then went out to the trailer. George had already arrived there. [Mike asked George something like "can I still get some." George said OK and loaded some hams into Mike's car. I helped also. Mike drove away, unloaded his car and then came back for some more hams. George said OK.]

Later that afternoon I was arrested by agents of the FBI. They were nice and polite when they arrested me. They also arrested George and Mike.

I have read the foregoing 6 pages and the statements therein are true, correct and voluntary in all respects. I have initialled and dated each page and sign my name below as indication of having read and understood those statements, as well as having made those corrections I have found necessary.

.....
Ronnie George Hamilton *

* Declines to sign until consults w/attorney.

¹ As noted in the Government's Brief, Judge Owen redacted this statement. The portions surrounded by brackets are those deleted by the District Judge.

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2/10/76

Pre-Arraignment Statement of Ronnie Hamilton
February 10, 1976

I wish to note that I had no idea what was contained in the trailer until George and his friends opened it up on Saturday night. They also told me if anybody wanted some of the hams, it was OK. So I took some more for my family and for my former boss.

Time Interview Terminated: 139 p.m.

Witnessed: Assistant U. S. Attorney /s/ Ira H. Block

Agents: /s/ Eugene F. Fitzpatrick

Bail Recommended:

ROR

Possible Bail Suggested

By Defendant:

Bail set by Magistrate:

ROR

Time of

Arraignment: 2:30 p.m.

Hearing:

3/1/76

Lawyer Arraignment—Carl

Bernstein (See Riker)

For case: Legal Aid Society

Jack Lipson

Bail Warnings Given?

Yes

Telephone

Appointed or Retained

(Circle One)

I H B
 2/10/76

